Public Prosecutor v Muhamad Pudzi bin Ab Rahman

HIGH COURT (TEMERLOH) — CRIMINAL TRIAL NO 45–3 OF 2004
MOHAMED APANDI J
29 OCTOBER 2007

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1)(b) — Prosecution's case against accused merely circumstantial — No knowledge, custody or control of drugs by accused shown — Whether prima facie case against accused made out — Whether accused ought to be acquitted and discharged — Dangerous Drugs Act 1952 s 39B(1)(b)

Criminal Law — Dangerous Drugs Act 1952 — s 37(h) — Presumptions — Presumption of concealment with knowledge — Drugs found in boot of car — Whether boot of car a secret or specially constructed compartment to carry drugs — Whether presumption under s 37(h) of Dangerous Drugs Act 1952 operable

Evidence — Circumstantial evidence — Nature of — Tooth of accused found in car containing dangerous drugs — Car registered in the name of another — Workshop receipts issued in the name of that other — Car key not produced or tendered as evidence — Accused charged with trafficking in the dangerous drugs — Whether there was circumstantial pointing irresistibly to guilt of the accused

On 17 March 2002, a Proton Perdana ('the said car'), was involved in an accident with a motor lorry. Apart from the driver, there was one other passenger in the said car. When the police arrived at the scene of the accident, they discovered that both driver and passenger of the said car had left the scene. The police at the scene noticed through the rear right window of the said car, transparent plastic packages of compressed dried leaves. The said car was then taken to a police station for further inspection. There, the police discovered several sacks and blocks of compressed dried leaves inside the boot of the said car. These leaves were later confirmed to be cannabis weighing 195,961 grams. Human specimens such as hair, blood and teeth were also recovered from the said car and sent for DNA analysis. The accused was arrested a year after the accident when the DNA profile of his blood specimen was found to match the DNA profile from a tooth recovered from the driver's seat of the said car. The accused was then charged with trafficking in dangerous drugs with another person still at large, an offence under s 39B of

the Dangerous Drugs Act 1952 read with s 34 of the Penal Code. The prosecution alleged that the accused was driving the said car at the material time. The facts indicated that the said car had changed ownership several times and the last owner, one Pak Ali had bought the said car just before the accident. However, he died a year after the accident. There was no evidence of any statement ever being recorded from Pak Ali. A prosecution witness, SP8 testified at the trial that this Pak Ali knew of the cannabis in the said car at the time of the accident and that the drugs belonged to Pak Ali. Workshop receipts pertaining to repairs to the said car were also issued in the name of Pak Ali. Further, the key to the said car was not produced at the trial.

Held, acquitting and discharging the accused without calling for his defence:

(1) In the instant case, the drugs were found in the boot of the said car. The boot of a car is not a secret compartment or a specially constructed compartment to carry drugs. That being the case the prosecution was deprived of using the presumption under s 37(h) of the Dangerous Drugs Act 1952 to support its case, which was based on circumstantial evidence (see para);*Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132; *PP v Lin Lian Chen* [1992] 2 MLJ 561; and *Shamsuddin bin Hassan & Anor* [1991] 3 MLJ 314 referred (see para 12).

(2) In the instant case, the accused was not arrested while in control of the said car. The said car was not detained at any roadblock or where the police had acted on information received. The car was detained for further inspection, after it was involved in an accident. There was no evidence to show who had control of the car before it was driven by the accused. There was also no evidence as to how the alleged drugs were placed into the boot of the car, in order to implicate the accused as to knowledge (see para 14).

(3) When the prosecution relies on circumstantial evidence, such evidence must point irresistibly to the guilt of the accused person. However in this case, the facts adduced did not allow for such an irresistible conclusion. There were doubts as to the actual custody and control of the car. There was no evidence to show the nexus between the accused person and the drugs found in the boot of the car that belonged to Pak Ali (see para 16).

(4) The damning testimony of SP8 made it clear that it was Pak Ali and not the accused, who had knowledge, custody and control of the cannabis in the said car. The workshop receipt pertaining to repair works to the said car was issued in the name of Pak Ali, denoting control of the said car by Pak Ali. The key to the said car was never produced at the trial. Neither was any explanation given as to why the key was not produced

A and tendered. The key to the car was an important exhibit as it could throw some light as to the custody and control of the drugs recovered from the boot, and also to the exclusive custody and control of the car itself (see para 21).

B (5) It was not known who the 'person still at large' was. There was also not an iota of evidence adduced to show common intention although it formed part of the charge against the accused (see para 24).

(6) From the facts adduced and on a maximum evaluation of the evidence, there was no nexus between the accused person and the drugs found in the boot of the said car. Mere discovery of drugs in the said car did not *ipso facto* prove possession of the drugs by the driver of said car. The prosecution had even failed to prove that the accused had knowledge of the drugs recovered. There was no direct evidence or circumstantial evidence to indicate 'mere possession', or '*mens rea* possession' (see para 29).

[Bahasa Malaysia summary

E Pada 17 Mac 2002, sebuah Proton Perdana ('kereta tersebut') telah terlibat dalam satu kemalangan dengan sebuah lori. Selain daripada pemandunya, terdapat seorang lagi penumpang dalam kereta tersebut. Apabila polis tiba ditempat kemalangan, mereka mendapati bahawa pemandu kereta dan penumpangnya telah meninggalkan tempat kejadian. Polis ditempat kejadian F mendapati di bahagian kanan cermin tepi kereta tersebut, terdapat bungkusan jernih plastik yang mengandungi daun-daun kering yang telahpun dimampatkan. Kereta tersebut telah dibawa ke balai polis untuk siasatan selanjutnya. Di sana, polis menemui beberapa guni dan blok daun-daun kering yang telah dimampatkan ditinggalkan dalam bahagian G belakang kereta Daun-daun ini kemudiannya disahkan sebagai ganja seberat 195,961 gram. Spesimen-spesimen manusia seperti rambut, darah dan gigi juga ditemui daripada kereta tersebut telah dihantar untuk analisa DNA. Tertuduh telah ditangkap setahun selepas kemalangan bila profail DNA daripada spesimen darah yang ditemui sama dengan profail DNA daripada H gigi yang ditemui daripada tempat duduk pemandu kereta tersebut. Tertuduh kemudiannya telah didakwa dengan mengedar dadah berbahaya bersama seorang lagi yang masih bebas di bawah kesalahan s 39B Akta Dadah Berbahaya 1952, dibaca bersama s 34 Kanun Keseksaan. Pihak pendakwaan mendakwa bahawa tertuduh adalah pada masa material adalah pemandu I kereta tersebut. Fakta-fakta juga menunjukkan bahawa kereta tersebut telah ditukar milik beberapa kali dan pemilik terakhir, seorang bernama Pak Ali telah membeli kereta tersebut sebelum kemalangan. Walaubagaimanapun, beliau meninggal dunia setahun selepas kejadian. Tiada keterangan untuk sebarang kenyataan direkodkan daripada Pak Ali. Saksi pendakwaan, SP8

memberi keterangan semasa perbicaraan bahawa Pak Ali mengetahui ganja dalam kereta tersebut semasa kemalangan dan dadah tersebut adalah kepunyaan Pak Ali. Resit-resit bengkel berkenaan baikpulih kereta tersebut juga dikeluarkan di atas nama Pak Ali. Seterusnya, kunci kepada kereta tersebut tidak dikemukakan semasa perbicaraan.

Diputuskan, membebaskan dan melepaskan tertuduh tanpa memanggil sebarang pembelaan;

(1) Dalam kes ketika ini, dadah telah dijumpai dalam bahagian belakang kereta tersebut. Bahagian belakang kereta bukanlah satu bahagian rahsia atau bahagian khusus yang dibuat untuk membawa dadah. Oleh yang demikian pendakwaan dihalang dari menggunakan andaian di bawah s 37(h) Akta Dadah Berbahaya bagi menyokong kesnya, yang mana merupakan keterangan ikut keadaan *Syed Ali Bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132 (dirujuk); and *PP v Lin Lian Chen* [1992] 2 MLJ 561 (dirujuk); *Shamsuddin Bin Hassan & Anor* [1991] 3 MLJ 314 (dirujuk) (lihat perenggan 12).

(2) Dalam kes ketika ini, tertuduh tidak ditangkap ketika beliau mempunyai kawalan terhadap kereta tersebut. Kereta tersebut tidak ditahan dalam sebarang sekatan jalan raya atau semasa polis bertindak berdasarkan maklumat yang diterima. Kereta tersebut telah ditahan untuk siasatan lanjut, selepas ia terlibat dalam kemalangan. Tiada sebarang keterangan bagi menunjukkan siapa yang mempunyai kawalan kereta sebelum dipandu oleh tertuduh. Juga tiada keterangan bagaimana dadah yang didakwa telah diletakkan dalam bahagian belakang kereta bagi tujuan untuk mensabitkan tertuduh dengan pengetahuan (lihat perenggan 14).

(3) Apabila pendakwaan bergantung kepada keterangan ikut keadaan, keterangan tersebut hendaklah menjurus terus kepada kebersalahan orang yang dituduh. Walaubagaimanapun dalam kes ini, fakta-fakta yang dikemukakan tidak membenarkan sebarang kesimpulan yang menjurus. Terdapat keraguan mengenai jagaan sebenar dan kawalan kereta. Tiada keterangan bagi menunjukkan hubungan antara orang yang dituduh dan juga dadah yang dijumpai dalam bahagian belakang kereta bahawa ia adalah kepunyaan Pak Ali (lihat perenggan 16).

(4) Keterangan yang merosakkan yang dibuat SP8 secara jelasnya bahawa ia adalah Pak Ali dan bukan tertuduh, yang mempunyai pengetahuan, jagaan dan kawalan ganja dalam kereta tersebut. Resit bengkel berkaitan kerja-kerja baikpulih kereta tersebut telah dikeluarkan di atas nama Pak Ali, menandakan kawalan kereta tersebut oleh Pak Ali. Kunci kereta tersebut tidak pernah ditunjukkan semasa perbicaraan. Tiada sebarang

penjelasan diberikan mengapa kunci tersebut tidak pernah ditunjukkan dan dikemukakan. Kunci kereta adalah eksibit yang penting memandangkan ia akan memberi sinar kepada jagaan dan kawalan kepada dadah yang dijumpai dibahagian belakang kereta, dan juga jagaan dan kawalan sepenuhnya kereta itu sendiri (lihat perenggan 21).

(5) Ia adalah diketahui siapa 'orang yang masih bebas' itu. Juga tiada sedikit pun keterangan yang dikemukakan menunjukkan niat bersama walaupun ia membentuk sebahagian pertuduhan terhadap tertuduh (lihat perenggan 24).

(6) Daripada fakta-fakta yang dikemukakan dan penilaian maksima keterangan, tiada sebarang hubungan antara orang yang dituduh dan penemuan dadah dibahagian belakang kereta tersebut. Penemuan dadah semata-mata dalam kereta tersebut tidak dapat ipso facto membuktikan milikan dadah oleh pemandu kereta tersebut. Pendakwaan juga gagal membuktikan bahawa tertuduh mempunyai pengetahuan berkenaan dadah yang dijumpai. Tidak ada sebarang keterangan langsung atau keterangan ikut keadaan bagi menunjukkan 'milikan semata-mata', atau 'milikan mens rea' (lihat perenggan 29).]]

Notes

For a case on nature of circumstantial evidence, see 7(1) *Mallal's Digest* (4th 2006, Reissue) para 634.

For a case on s 37(h), see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 236.

For a case on s 39B(1)(b) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) para 501.

Cases referred to

Chan King Yu v PP [2006] 6 MLJ 128 (refd)
Dato Mokhtar Bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Muhamad Safarudin Baba & Anor v PP [2002] 4 MLJ 353 (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1 (refd)
PP v Chow Kam Meng [2001] MLJU 386 (refd)
PP v Hatib Gumbali bin Iman Bakiri [2002] MLJU 226 (refd)
PP v Karim bin Ab Jaabar [2002] 2 MLJ 488 (refd)
PP v Lim Bong Kat & Anor [1992] 4 CLJ 2173 (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561 (refd)
PP v Ng Ah Kiat [1987] 2 MLJ 336 (refd)
PP v Nik Ahmad Aman bin Nik Mansor [2002] 5 MLJ 641 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (refd)
PP v Ong Boon Kek & Anor [1991] 3 CLJ 1744 (refd)
PP v Tan Tuan Seng [1993] 2 CLJ 557 (refd)
PP v Tan Kim Piow [2006] 5 MLJ 409 (refd)
Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314 (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)

Chief of the Narcotic Division, IPD Raub. By the time the police arrived, both the alleged driver and passenger of the car left the scene with another car.

[6] On instructions of SP1, the car WHJ2229 was taken to Raub police station for further inspection. Upon inspection they discovered inside the boot of the Perdana there were several sacks and several blocks of compressed dried leaves suspected to be cannabis wrapped in transparent plastic packages. After moving the sacks and the blocks from the car, it was counted that there were a total of 190 packages of compressed dried leaves of which 136 are in five sacks and 54 scattered in the boot of the car.

[7] All these packages were sent to SP7, Nazarudin bin Mohamed, a government chemist for analysis and it was proven that the dried leaves were cannabis which is defined as dangerous drug in Part I and II of the First Schedule of the Dangerous Drugs Act 1952 weighing 195,961g.

[8] The police, following a typical crime scene investigations, proceeded at great length to find out who was the driver of the car WHJ2229 at the time of the accident. In the course of the investigations, various exhibits were taken from the car, namely:

(i) several strands of hair located at the driver's seat (exhs P20(A)– P20(B));

(ii) a tooth located at the driver's seat (exh P21B));

(iii) a piece of straw located at the driver's seat (exhs P22(B)).

(iv) sheets of tissue paper located at the driver's seat (exh P23(B));

(v) several strands of hair located at the passenger seat (exh P24(B));

(vi) swap of blood sample located at the passenger seat (exh P25(B));

(vii) pieces of glass suspected to have blood stain located at the passenger seat (exh P26(B));

(viii) swap of blood sample found at the front passenger seat (exh P27(B));

(ix) swap of blood sample found at the front passenger seat (exh P28(A));

(x) swap of blood sample found at the front passenger seat (exh P29(B));

(xi) swap of blood sample found at the seat belt of the front passenger seat (exh P30(A)).

[9] All these were sent to SP5, Lim Kong Boon, Director of the Chemistry Department for forensic DNA analysis. SP5 was also given a plastic tube labelled 'Muhamad Pudzi' containing human blood (exh P32C). On

Legislation referred to

Criminal Procedure Code s 180(2)
Dangerous Drugs Act 1952 ss 3, 37(h), Part I & ll First Schedule II
Penal Code s 34

Wan Jawahir & Co for the accused.

Mohamed Apandi Ali J:

[1] The accused was charged for trafficking of 195,961g cannabis, an offence under s 39B(l)(b) Dangerous Drugs Act 1952.

[2] The charge reads as follows:

> Bahawa kamu bersama seorang lagi yang masih bebas pada 17 Mac 2002, jam lebih kurang 4.45 petang di KM354 Jalan Alternatif Kuala Lumpur-Kota Bharu, di dalam Daerah Raub, dalam Negeri Pahang Darul Makmur, dalam melakukan niat umum bersama kamu semua, telah mengedar dadah berbahaya iaitu 195,961 gram cannabis. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah s 39B(l)(a) Akta Dadah Berbahaya 1952, dan boleh dihukum di bawah s 39B(2) Akta yang sama serta dibaca bersama dengan s 34 Kanun Keseksaan.

[3] At the end of the prosecution's case, this court found that the prosecution had failed to make out a prima facie case against the accused, and therefore he was acquitted and discharged without calling for his defence. The prosecution is not happy with the said acquittal decision hence this appeal.

BRIEF FACTS OF THE CASE

[4] On 17 March 2002, at about 4.45pm, the accused was alleged to be driving a Proton Perdana WHJ 2229 (the Perdana), from Rantau Panjang Kelantan, heading towards Kuala Lumpur, together with a woman who was seated at the front passenger seat. At that material time, the Perdana was involved in an accident with a motor lorry driven by one Mohd Shukri bin Mohd at KM354 Jalan Alternate Kuala Lumpur-Kota Bharu. As a result of the accident, all of them sustained injuries.

[5] Police officers arrived at the scene of the accident shortly later and upon inspection of the car they saw, through the rear right window of the car, transparent plastic packages of compressed dried leaves. The police then informed his superior who later informed SP1, C/Inspector Rosli who is the

comparisons of the DNA profiles obtained from P32C and DNA profiles from P21B, it was found that these two DNA profiles matches each other and this indicated that both originated from the same source, and this led to the arrest of the accused, about one year after the accident.

[10] The accused was later charged with trafficking in cannabis with another person still at large. Who the person still at large was unknown.

ISSUES TO BE DETERMINED

[11] The court was satisfied that the drugs found were cannabis as defined under s 2 Dangerous Drugs Act 1952 but there remains three main issues that have to be determined in order for the prosecution to succeed in its case, namely:

(i) issue of custody and control, tantamounting to possession of the drugs found in the boot of the car;

(ii) issue of trafficking of the said drugs; and

(iii) issue of the element of common intention, with the meaning of s 34 Penal Code, as this was mentioned in the charge.

ISSUE ON POSSESSION AND TRAFFICKING

[12] From the facts of the case, the prosecution was relying heavily on circumstantial evidence to prove its case. It is even heavier when the alleged drugs were found in the boot of a car. Such part of a car is not a secret compartment or a specially constructed compartment to carry drugs. That being the case it is clear that the prosecution was deprived of using any presumption in bolstering a case based on circumstantial evidence, namely the presumption under s 37(h) of the Dangerous Drugs Act 1952. The cases of *Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132 and *PP v Lin Lian Chen* [1992] 2 MLJ 561 and *Shamsuddin bin Hassan & Anor* [1991] 3 MLJ 314, all decided by the Apex Court, are sufficiently clear on this issue.

[13] Over the years there has been a number of reported cases of drugs found in a motor vehicle, where for reasons of no evidence of knowledge of the alleged drug and lack of exclusive control of the vehicle, it has been held by the courts that the accused person did not have custody and control of the alleged drugs and therefore the element of possession has not been proved. Such decisions can be seen in the following cases:

(1) *PP v Ong Cheng Heong* [1998] 6 MLJ 678

OKT was at the wheels of a motorcar with a passenger. Motorcar was stopped at a road-block. Two plastic bags containing drugs found in boot of the car. Held: No case on trafficking or possession of drugs.

(2) *PP v Ong Boon Kek & Anor* [1991] 3 CLJ 1744

Both accussed were found seated in a car. Upon search of car, police found three packages under the floor mat of the driver's seat and another package in the glove compartment. Both were acquitted, as there is no proof of control or custody of the packages, allegedly containing heroin).

(3) *PP v Lim Bong Kat & Anor* [1992] 4 CLJ 2173

A motorcar with driver and passenger was stopped by police. The passenger ran but was arrested. Both driver and passenger were arrested. Upon examination of car, found seven packets containing heroin hidden behind window panel on the driver's side. Held: No case against first accused (the passenger) as he had no custody or control.

(4) *PP v Tan Tuan Seng* [1993] 2 CLJ 557

(OKT seen driving a motorcar. After stopping and alighting, he was arrested. Upon search of car, police found a bag containing drugs in the front passenger seat. Held: Accused had no knowledge of the drugs and he was acquitted.)

(5) *PP v Chow Kam Meng* [2001] MLJU 386

Motorcar driven by OKT with another as passenger. When stopped by police, both tried to run away. Both arrested. Three bags containing 20 packages were found in the car. Motorcar was owned by some one else, and owner could not be traced. Held: No evidence to show OKT had control/possession of the drugs.

(6) *PP v Hatib Gumbali bin Iman Bakiri* [2002] MLJ 226

Car key found on table in hotel room occupied by OKT. OKT led police to motocar. Drugs were found in an envelope under the rug. Motorcar belongs to another, who denied lending to OKT. Held: Prosecution failed to establish a prima facie case that OKT was in possession of the drugs.

(7) *PP v Karim Bin Ab Jaabar* [2002] 2 MLJ 488

Package in the front passenger seat and another similar package in boot. OKT was arrested while at the wheels of motorcar. Motorcar belongs to another — cannot be traced. No evidence as to duration of OKT having been in charge of motorcar. Held: Could not infer custody/control of drugs in motorcar.

(8) *PP v Nik Ahmad Aman Bin Nik Mansor* [2002] 5 MLJ 641

Police in an operation, wanted to stop 2 cars, one driven by OKT. Shots were fired, occupant of the other car died and OKT fled the scene and drove away. Motorcar was blocked, OKT ran but arrested. Bundles of cannabis were found in boot. It was a stolen car. Held: No evidence to prove possession, and no evidence to prove trafficking.

(9) *PP v Omar bin Mohamad @ Abd. Aziz* [2003] MLJ 12
Drugs in glove compartment. OKT had in his possession the car keys. Motorcar belongs to father of OKT. Other used the motorcar. Held: No evidence to show custody/control of drivers by OKT.

(10) *PP v Mohd Zulkifli bin Abdul Gani & Anor* [2003] 5 MLJ 337
Acting on information, Custom Officers set up roadblock and a m/van was stopped, whereby two packages was found on the floor, one at the front and the other at the rear. Two persons were arrested, the driver and a passenger, and both were charged. Both were acquitted.

[14] The facts in this case is very much weaker than in those cases cited above. Here, the accused was not arrested while in control of the car. The car was not detained at any road-block or where the police acted on information received. The car was detained for further inspection, after it was involved in an accident.

[15] In view of the above set of circumstances, no evidence was unfolded to show who had control of the car before it was driven by the accused. There was also no evidence as to how the alleged drugs were placed into the boot of the car, in order to implicate the accused as to knowledge.

[16] When prosecution relied on circumstantial evidence, such evidence must point irresistibly to the guilt of the accused person. On the contrary in this case, the facts adduced does not make any headway for such an irresistible conclusion. There are doubts as to the actual custody and control of the car.

THE MOTORCAR WHJ 2229

[17] The motorcar WHJ2229 was bought by one Noraswati (SP10) sometime in year 2001. It was registered in her name. In September 2001, she sold the car to one Nazri (SP12). Nazri later sold it to another person known as Pak Ali.

[18] It is most unfortunate for the prosecution that the said Pak Ali, who purchased the car just before the accident and discovery of the drugs cannot make himself available because he died about one year after the accident. Furthermore it is also most unfortunate that no evidence was adduced if any

A statement was ever recorded from this Pak Ali; otherwise such statement could have been tendered as evidence, for whatever it is worth. However, with that lacuna there is no evidence to show the nexus between the accused person and the drugs that was found in the boot of the car that belongs to Pak Ali.

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[19] To add salt to injury, one of the prosecution witnesses, namely Wan Mohamad Yusoff bin Mohd Salleh (SP8) testified that Pak Ali knew that cannabis (ganja) was in the car when it was involved in the road accident. In the last part of his examination-in-chief, SP8 said:

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> Saya pergi untuk tumpang arwah ke Kuala Lumpur'. Sebenarnya saya tidak tahu apa yang dibawa oleh Pak Hassan. Selepas kemalangan, barulah Pak Ali beritahu barang itu ialah ganja. Arwah Ali ada beritahu tidak payah bawa balik barang kerana barang itu ialah ganja.

D

[20] Under cross-examination, SP8 said:

> Semua keadaan pada hari kejadian ialah di bawah kawalan dan arahan Pak Ali. Saya tidak tahu jika dia pernah ditangkap berkait kes dadah. Saya tidak tengok kemalangan. Sesiapa bawa kereta saya tidak tengok. Saya setuju, jika ada barang dalam kereta, barang itu adalah kepunyaan Pak Ali. Under re-examination by Learned DPP, SP.8 said: 'maksud dibawah kawalan dan arahan arwah Pak Ali' ialah keselamatan Pak Hassan dan barang arwah Pak Ali. Dia ada kata bahawa barang itu ialah barang dia. Memang kerja seludup ialah kerja Ali dan dalam perjalanan selepas berlaku kemalangan, dia ada kata barang itu ialah barang dia. Barang itu ialah ganja.

E

F

[21] From such damning testimony of SP.8, it is clear that it was Pak Ali and not the accused, who had knowledge, custody and control of the cannabis in the car. Furthermore, a workshop receipt pertaining to some repair works to the car, WHJ2229 that was tendered as exh P37, was issued in the name of Pak Ali. This denotes control of the car by Pak Ali.

G

[22] Compounding the weakness of the prosecution's case in respect of custody and control of the car, the key to the vehicle was never produced at the trial. Neither was any explanation given as to why the key was not produced and tendered. It is to be noted that the key to the car is an important exhibit as it can throw some light as to the custody and control of the drugs recovered from the boot and also as to the exclusive custody and control of the car itself.

H

I

ISSUE ON COMMON INTENTION ELEMENT

[23] As stated in the charge, the accused person was charged for the offence

with another person still at large and the charge is read together with s 34 Penal Code. The element of common intention was incorporated in the charge.

[24] From evidence adduced it was not known or made known who is the 'person still at large'. Is it the character, Pak Ali or the female passenger in the car? This is a nagging doubt that was left hanging at the end of the case for the prosecution. Nevertheless there is not an iota of evidence that was adduced to show common intention. In fact, nobody submitted on this issue, even though it forms part of the charge preferred.

[25] The issue of common intention as envisaged by s 34 of the Penal Code has been discussed in so many decided cases. It is sufficed to mention a few, such as:

[26] In *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 267, His Lordship Hashim Yeop A Sani J (as he then was) said:

> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of cource difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case (see *Mahbub Shah v King Emperor*). The doctrine of common intention is as expressed in s 34 of the Penal Code itself which reads:
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone.
>
> It is also a common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined. Thus it is clear that the leading feature of s 34of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfill the requirements of s 34. First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence...

[27] In *Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344, His Lordship Syed Agil Barakbah SCJ said:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proof either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention. Direct intention of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused.

[28] In *Muhamad Safarudin Baba & Anor v PP* [2002] 4 CLJ 210 at p 222, His Lordship Mohd Noor Ahmad JCA (as he then was) said:

> It is trite law that common intention within the meaning of s 34 of the Code implies a pre-arranged plan and to convict an accused person of an offence applying the section it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. It is difficult if not impossible to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case (see the Privy Council case of *Mahbub Shah v Emperor AIR* 1945 PC 116). We are of the view that although the conduct of the first appellant on that occasion and his awareness that the first appellant was carrying the box might be relevant factors in order to consider the element of common intention but the knowledge presumed by s 37(d) of the Act upon the second appellant ought not to have been imputed to the first appellant because he did not have the custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of common intention, although they might raise the suspicion that the first appellant was involved with such drug. Suspicion, no matter how strong, is not evidence.

CONCLUSION

[29] From facts adduced and by maximum evaluation of the evidence, where principally the prosecution's case is one based on circumstantial evidence, this court finds that there is no nexus between the accused person and the drugs found in the boot of the Perdana. Mere discovery of drugs in the Perdana does not *ipso facto*prove possession of the drugs by the driver of the Perdana. The prosecution has even failed to prove that the accused had knowledge of the drugs recovered.

[30] And if the facts of the case were to be tested against the latest Federal Court case of *PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1, and the recent Court of Appeal cases of *PP v Tan Kim Piow* [2006] 5 MLJ 409 and *Chan King Yu v PP* [2006] 6 MLJ 128, there are no direct evidence or circumstantial evidence that can even give the slightest colouring to indicate mere possession, what more '*mens rea* possession'.

[31] For reasons as explained above, I conclude that the prosecution has failed to prove a prima facie case and pursuant to the provisions of s 180(2) of the Criminal Procedure Code, the accused is acquitted and discharged without calling for his defence.

Accused acquitted and discharged.

Reported by Andrew Christopher Simon